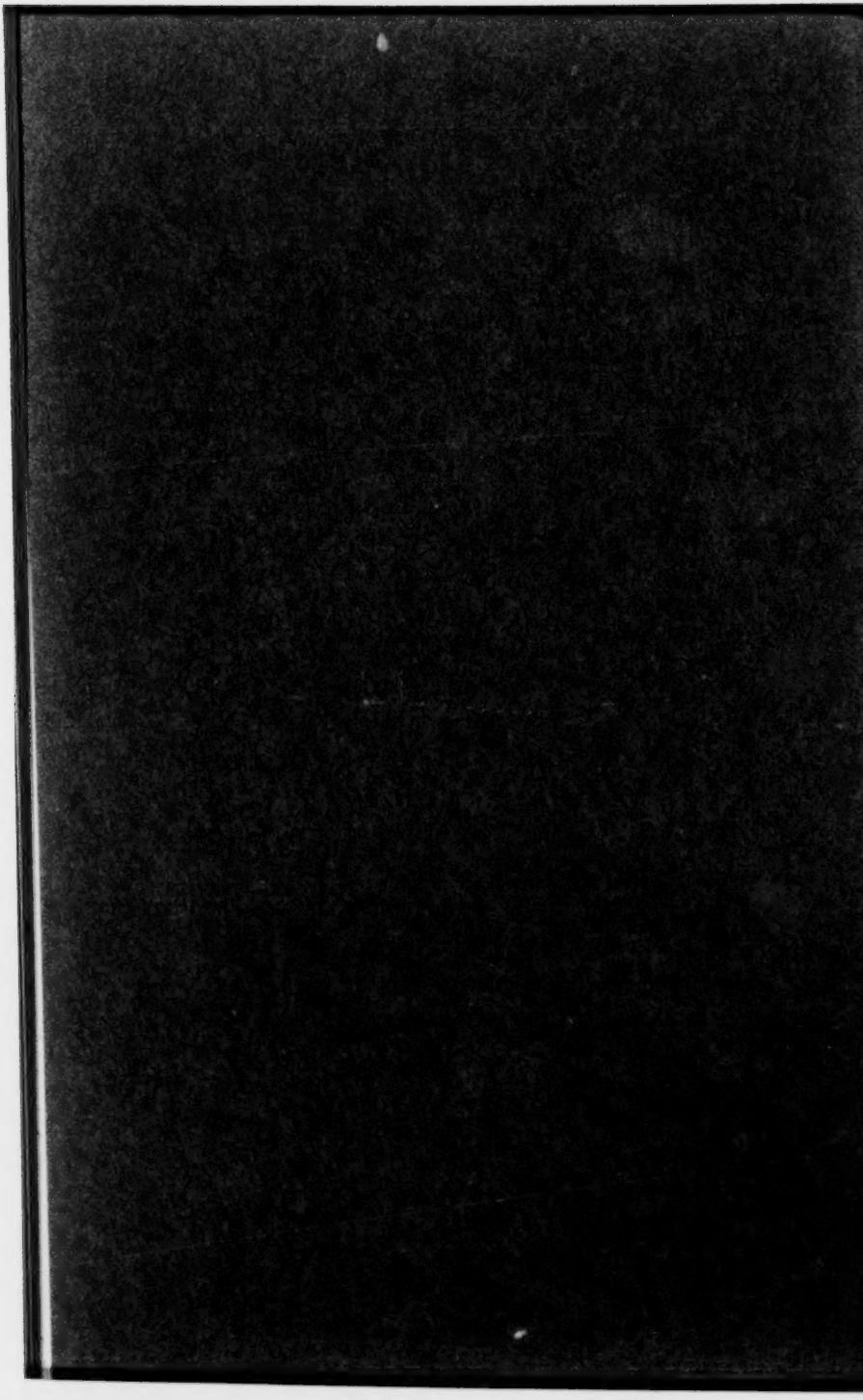

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# In the Supreme Court of the United States

OCTOBER TERM, 1940

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No. 145

WILL G. REA AND FRANK FORESMAN, AS TRUSTEES OF THE REA & READ MILL AND ELEVATOR COMPANY, A CORPORATION, DISSOLVED, PETITIONERS

*v.*

ACEL C. ALEXANDER, COLLECTOR OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The memorandum opinion of the district court (R. 163) is not reported. The opinion of the circuit court of appeals (R. 289–294) is reported in 110 F. (2d) 898.

### JURISDICTION

The judgment of the circuit court of appeals was entered March 18, 1940 (R. 295). The petition for certiorari was filed June 12, 1940. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether, after the Commissioner of Internal Revenue has granted a special assessment of profits taxes, pursuant to Sections 327 and 328 of the Revenue Act of 1918, a court may, in an action for refund of income and profits taxes, revise the Commissioner's determination of the taxpayer's net income.

## STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> * * * * *
>
> (d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. * * *
>
> SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the

taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. * * *

STATEMENT

This is an action to recover income and excess profits taxes paid by the Rea & Read Mill and Elevator Company for the year 1918.

Following certain preliminary negotiations the Elevator Company requested of the Commissioner that its excess profits tax for the year 1918 be computed under Sections 327 and 328 of the Revenue Act of 1918, *supra*. The item of income which, the Company contended, resulted in an abnormal condition entitling it to the benefits of Sections 327 and 328 arose from the sale by the Company of the land upon which its milling plant was located (R. 248). The Company retained the use of the land by a lease for a two-year term (R. 269–273).

The request of the Company was granted by the Commissioner (R. 249, 252) and a reaudit showing a $10,466.34 deficiency was transmitted to the Company on December 7, 1925 (R. 251–253). In response to the letter of December 7, 1925, the Company signed an agreement consenting to an assessment of the $10,466.34, but attempting to reserve the right to file a refund claim (R. 145). Thereafter the Company paid the $10,466.34 and, on Feb-

ruary 26, 1928, filed a claim for refund (R. 146). As a ground for its claim the Company asserted that its taxable income for 1918 should reflect depreciation on its milling plant based upon a remaining life of twenty-four months, the life of the lease on the land. This claim for refund was rejected by the Commissioner on November 16, 1928 (R. 151).

On April 16, 1930, another claim for refund was filed, asserting that the Company was entitled to offset not only the March 1, 1913, value of the land against the sum received from its sale, but also the March 1, 1913, value of the buildings and equipment standing on the land (R. 285). This claim for refund was rejected by the Commissioner on September 19, 1930 (R. 151).

Suit for recovery of the taxes paid was instituted April 17, 1931 (R. 5). In his answer to the petition the Collector asserted that the Company's profits tax had, at its request, been computed under the provisions of Sections 327 and 328, and that the Company had therefore waived its right to proceed in court for a judicial review of the Commissioner's determination (R. 16–17).

The district court entered judgment in favor of the taxpayer for $10,510.05, plus interest (R. 166–167). The circuit court of appeals held that the district court was without jurisdiction to entertain the action, and reversed the judgment and remanded the cause with instructions to dismiss the petition (R. 295).

ARGUMENT

The contentions urged by petitioners are squarely foreclosed by decisions of this Court. In *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, this Court held that, where a special assessment had been made of a profits tax under Sections 327 and 328, the courts are without jurisdiction, in a suit for a refund of the profits tax, to recalculate the taxpayer's net income and recompute the profits tax accordingly. And in *Welch* v. *Obispo Oil Co.*, 301 U. S. 190, the Court held that, when a special assessment has been made of the profits tax, a court may not entertain an action for refund of an amount paid on the accompanying income tax on the ground that the income was erroneously determined.

These decisions fully cover this case, and nothing appears here to make them inapplicable. At the taxpayer's request the tax was computed under the special assessment provisions. In applying those relief provisions the amount of the income tax payable is dependent upon the amount of the profits tax and the amount of the profits tax is dependent upon the amount of the net income. Accordingly, a change in the amount of the net income to which the profits tax rate is applied would, of course, produce a change in the amount of the profits tax. The profits tax involves discretionary matters confided to the Commissioner, and it is therefore inappropriate for a court which cannot revise his discretionary determination to undertake to change the

factors upon which its exercise depends. These considerations are fully pointed out in the above-cited decisions.

Petitioners' assertion (Pet. 10–12) that under its contentions there was an overpayment even without the benefit of the special assessment provisions does not distinguish this case from *Welch* v. *Obispo Oil Co., supra.* There the Court held that the suit could not be maintained even though the taxpayer showed that it would be entitled to a substantial refund even if it were denied the deduction of the whole of the profits tax from the net income (301 U. S. at 194). The 1937 decision in the *Obispo Oil* case makes it unnecessary to consider the asserted conflict on this point with the earlier cases of *Daily Pantagraph* v. *United States,* 37 F. (2d) 783 (C. Cls., 1929); *McKeever* v. *Eaton,* 6 F. Supp. 697 (Conn., 1934); and *United States Paper Exports Ass'n* v. *Bowers,* 6 F. Supp. 735 (S. D. N. Y., 1934), disposed of on other grounds, 80 F. (2d) 82 (C. C. A. 2d).

Petitioners also assert (Pet. 9–10) that the Commissioner made "no final determination of true net income", and that it was therefore open to the courts below to review the Commissioner's determination under Section 328. Petitioners proffer no explanation of this assertion, and its meaning is unclear. The Commissioner of course determined net income in making the deficiency assessment of December 7, 1925, which the Company paid. The Commissioner's letter of December 7 (R. 253) did

state that the limitations period precluded careful consideration of all the facts in the case, and requested that the Company agree to an extension of time within which additional tax might be assessed, if found to be due. However, the Commissioner's determination of net income at that time was final in the sense that he did not change it subsequently, and in that it was the basis on which the tax was assessed and paid. There is nothing in the cases cited by petitioners (Pet. 9) to indicate that a "final" determination must be unhurried or that it means anything more than the last administrative computation.

## CONCLUSION

The decision below follows the decisions of this Court. There is no conflict of authority and the case is of no general importance. The petition should be denied.

Respectfully submitted.

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